U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 30Sep2002

Case No: 2001-BLA-1016

In the Matter of

DONALD LITTON,
Claimant

v.

REBEL COAL COMPANY,
Employer,

AMERICAN BUSINESS & PERSONAL INSURANCE MUTUAL, INC.,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Cynthia Mulliken, Esquire
For the claimant

John T. Chafin, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also

recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On July 23, 2001, this case was referred to the Office of Administrative Law Judges for a formal hearing. (DX 43). Following proper notice to all parties, a hearing was held on June 25, 2002, in Prestonsburg, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present post-hearing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. JX refers to the joint stipulation of medical evidence. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES[1]

The following issues remain for resolution:

1. whether the miner has pneumoconiosis as defined by the Act and regulations;

2. whether the miner's pneumoconiosis arose out of coal mine employment;

3. whether the miner is totally disabled;

4. whether the miner's disability is due to pneumoconiosis; and

5. whether the evidence establishes a material change in conditions within the meaning of Section 725.309(d).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Donald Litton, was born on April 22, 1945. (DX 1). Mr. Litton married Phyllis Vanhoose on March 22, 1992, and they reside together. *Id.* On his application for benefits, claimant alleged that he has one dependent child, Christopher Donald Litton. *Id.* Claimant's son is the offspring of his previous marriage to Joyce Roberta Lowe. *Id.*

Claimant began to notice his breathing difficulties from 1982 to 1984. (Tr. 16). His emerging breathing problems made work very difficult, but he continued in his coal mine employment. *Id.* Claimant was forced to end his work in the coal industry due to a back injury suffered in a fall from mining equipment. *Id.* He has not worked since his back injury.

Claimant's breathing problems complicate his domestic life, as performing household chores or playing with his grandchildren is difficult. (Tr. 21). Occasionally, Claimant mows his

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[1] The transmittal package indicates that the instant case includes a modification claim. (DX 43). My review of the case file indicates, however, that only a duplicate claim is in question. In his October 23, 2000 appeal of the District Director's September 15, 2000 decision, (DX 18), Claimant simultaneously requested modification and a hearing before an administrative law judge. (DX 24). In acknowledging the appeal, the District Director treated the appeal as a request for reconsideration. (DX 25). The District Director's subsequent two denials do not purport to hold Claimant to a modification standard. (DX 32, 38). On the contrary, the District Director's statements continue to hold out the possibility of modification. *Id.* Given this evidence, I find the challenge to any modification claim is in error because no such case exists. I shall evaluate the newly-submitted evidence to determine if such evidence establishes a successful duplicate claim.

lawn on his riding lawn mower when the temperature is not too hot. (Tr. 21-22). Claimant is limited to short walks due to breathlessness. (Tr. 22).

In addition to his breathing and back problems, Claimant suffers from high blood pressure and stomach and cardiac problems. (Tr. 17-20). He is seen by various physicians for his physical ailments, and he utilizes inhalers and an oxygen machine to treat his breathing difficulties. (Tr. 18).

Claimant testified that he has smoked approximately one pack of cigarettes per day for thirty-one years. (Tr. 28).

Mr. Litton filed his application for black lung benefits on June 6, 2000. (DX 1). The Office of Workers' Compensation Programs denied the claim on September 15, 2000, and, after reviewing additional evidence, affirmed its denial on December 11, 2000, and April 26, 2001. (DX 18, 32, 38). Pursuant to claimant's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 40, 43).

Claimant filed his first claim for black lung benefits on January 21, 1988. (DX 42-1). On May 12, 1993, an administrative law judge denied benefits. (DX 42-97). Claimant appealed the denial, but his appeal was eventually dismissed as abandoned by the Benefits Review Board [BRB]. (DX 42-107).

Coal Mine Employment

The duration of a claimant's coal mine employment is relevant to the applicability of var-ious statutory and regulatory presumptions. At the hearing, the employer stipulated that Mr. Litton worked for fourteen years in qualifying coal mine work, which is the employment duration alleged on Claimant's application for benefits. (Tr. 9; DX 1). Based upon my review of the record, I accept the stipulation as accurate and credit claimant with fourteen years of coal mine employment.

During his coal mine employment, Claimant performed various manual labor jobs, but he primarily worked as a heavy equipment operator. Claimant ran a bull dozer, operated a coal drill, and drove a coal truck, but his main job was to run a coal loader. (Tr. 13-14). Claimant was exposed to large amounts of coal and rock dust, although all of his coal mine employment was performed above-ground. (Tr. 13-15). The record demonstrates that the claimant's coal mine employment was not hard manual labor. Rather, Claimant's "driving" of the heavy equipment appears to require only a modicum of exertion, as evidence by Claimant's allegation that his employment required him to sit eight hours per day. (DX 3). In addition, nothing contained in
Claimant's testimony, behavior on the witness stand, or his written allegations alters my perception on the, at most, average exertional requirements of Claimant's job. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996).

Medical Evidence[2]

A. X-ray reports[3]

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 24	06/12/00	06/12/00	Potter	½ pneumoconiosis
DX 24	06/12/00	06/15/00	Sundaram	½ pneumoconiosis
DX 13	07/17/00	07/17/00	Sundaram	½ pneumoconiosis
DX 14	07/17/00	08/18/00	Sargent/B/BCR	Negative.
EX 2	07/17/00	09/19/01	Branscomb/B	Negative.
EX 1	07/17/00	09/11/01	Fino/B	Negative.
DX 16	07/22/00	07/22/00	Dahhan/B	Negative.
DX 28	07/22/00	10/26/00	Binns/B/BCR	Negative.
DX 28	07/22/00	10/27/00	Gogineni/B/BCR	Negative.
DX 28	07/22/00	10/31/00	Baek/B/BCR	Negative.
CX 1	04/22/02	04/22/02	Potter	1/1 pneumoconiosis.
CX 1	04/22/02	05/14/02	Sundaram	2/1 pneumoconiosis.
EX 7	04/22/02	07/31/02	Halbert/B	Negative.
EX 7	04/22/02	07/31/02	Poulos/B	Negative.

[2] The instant case is a duplicate claim. 20 C.F.R. §725.309 (2000). Thus, I shall summarize only the evidence added to the record subsequent to the previous denial. I incorporate herein the previous summary of medical evidence contained in the May 12, 1993 administrative law judge decision. (DX 42-97).

[3] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. §718.102(a,b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

B. Pulmonary Function Studies[4]

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 24 06/28/00	Sundaram	55 72’	2.13	2.89	57.2		Yes	Moderate chest restriction.
DX 8 07/17/00	Sundaram	55 71’	2.21 2.22*	2.97 3.38*	63.0 74.0*		Yes	Good cooperation and good comprehension.
DX 16 07/22/00	Dahhan	55 67’	1.86 2.56*	2.81 3.56*	54.25 87.81*		Yes	Good cooperation and good comprehension.

*denotes testing after administration of bronchodilator

Validation Studies:

On November 1, 2000, Dr. N. K. Burki, board-certified in internal medicine with a pulmonary subspecialty, issued a validation opinion addressing the June 28, 2000 pulmonary function study performed on the claimant. (DX 26, 10). Dr. Burki opined that the study was invalid due to “less than optimal effort, cooperation, and comprehension” and insufficient trials *Id.* Dr. Burki issued another opinion addressing the study on November 11, 2000. (DX 31). The doctor again concluded that the study was invalid due to suboptimal effort and an insufficient number of MVV or FEV tracings.

On November 3, 2000, Dr. Ben Branscomb issued a validation opinion addressing the June 28, 2000 pulmonary function study. (DX 29). Like Dr. Burki, Dr. Branscomb opined that the study was invalid due to 1) extremely slow initial flow as demonstrated by the lack of sufficient curves in the graph printout, 2) no indication that the required number of efforts was made, and 3) the lack of explanation for crossing out the computer analysis reporting poor patient effort.

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[4] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. §718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in “substantial compliance” with the quality standards at § 718.204 (c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

On August 18, 2000, Dr. Burki issued a validation opinion addressing the July 17, 2000 pulmonary function study performed on the claimant. (DX 9). Dr. Burki opined that the study was invalid due to suboptimal effort.

Dr. Burki issued another validation study on August 12, 2000, addressing the claimant's July 22, 2000 pulmonary function study. (DX 17). The doctor opined that the study was invalid due to suboptimal effort.

C. Arterial Blood Gas Studies[5]

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
DX 12	07/17/00	Sundaram	42.9	91.6	Resting	
			35.9	108.1	Exercise	
DX 16	07/22/00	Dahhan	37.7	90.1	Resting	
			28.3	118.2	Exercise	

D. Narrative Medical Evidence

Dr. Raghu Sundaram examined the claimant on June 15, 2000. (DX 24). The doctor recorded a seventeen year history of exposure to coal dust for Claimant. Dr. Sundaram also recorded that the claimant smoked one-half pack of cigarettes per day, but the doctor did not note the length of Claimant's smoking history. During the examination, Claimant complained of shortness of breath after walking one block or climbing one flight of stairs. The doctor also noted Claimant's inability to bend, crawl, or stoop due to shortness of breath. Dr. Sundaram submitted the claimant to a chest x-ray, pulmonary function study, and an arterial blood gas study, in addition to his physical examination. After his examination, the doctor diagnosed coal workers' pneumoconiosis "due to exposure to coal dust." *Id.* The doctor's opinion also indicates that his interpretation of the claimant's chest x-ray also informed his diagnosis. The doctor also concluded that the claimant suffered from a pulmonary impairment "due to exposure to coal dust." *Id.* Dr. Sundaram opined that Claimant was no longer physically able, from a pulmonary standpoint, to engage in his usual coal mine employment or comparable and gainful work in a dust free environment.

[5] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. §718.105(a).

Dr. Sundaram examined the claimant again on July 17, 2000. (DX 11). Dr. Sundaram reviewed Claimant's employment history form which demonstrates approximately twelve years
of coal mine employment. (DX 2). The doctor also recorded a thirty year smoking history for Claimant, at one pack per day. (DX 11). During the examination, Claimant complained of sputum production, wheezing, and paroxysmal nocturnal dyspnea. The claimant also reported dyspnea, cough, and chest pain upon walking one-half block on level ground. Dr. Sundaram submitted the claimant to a chest x-ray, pulmonary function study, and an arterial blood gas study. The doctor diagnosed coal workers' pneumoconiosis based upon prolonged exposure to coal dust. The doctor also opined that the claimant lacked the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment based upon Claimant's shortness of breath as demonstrated with the physical examination, chest x-ray, and pulmonary function test. Dr. Sundaram attributed Claimant's impairment to both smoking and coal dust exposure.

Dr. Abdul K. Dahhan examined the claimant on July 22, 2000. (DX 16). The doctor recorded a fourteen year coal mine employment history as a heavy equipment operator and a twenty-five year smoking history primarily as a one-pack-per-day smoker. The claimant complained of daily cough, wheezing, and dyspnea upon climbing a flight of stairs. The doctor submitted the claimant to an electrocardiogram, arterial blood gas study, carboxyhemoglobin test, pulmonary function test, and a chest x-ray. Dr. Dahhan opined that Claimant did not suffer from pneumoconiosis based upon his physical examination, pulmonary function testing, arterial blood gas study, and chest x-ray. The doctor noted a mild obstructive ventilatory defect, but he opined that the claimant retained the respiratory capacity to continue his previous coal mining work. Dr. Dahhan diagnosed Claimant with hypertension, hypertensive cardiovascular disease with sinus bradycardia, peptic ulcer disease, anxiety, and low back pain.

On November 26, 2001, Dr. Ben Branscomb, board-certified in internal medicine, performed an independent medical review of the medical evidence in Claimant's file to that date. (EX 4). The doctor noted a fourteen year coal mine employment history as the most accurate figure in the records. Dr. Branscomb stated that the claimant had not been forthcoming with accurate estimates of his smoking history, commenting that estimations of the claimant's smoking history have wavered from no smoking history to over two decades of heavy smoking. Dr. Branscomb

opined that such a history would make Claimant susceptible to smoking-related pulmonary and cardiovascular disorders. In his review, the doctor reviewed numerous reports from other physicians, chest x-rays, pulmonary function tests, and arterial blood gas studies. The doctor thoroughly catalogued and broke-down the physical examination, chest x-ray, and pulmonary testing findings of each physician. After his review, the doctor opined that the claimant did not suffer from pneumoconiosis. Dr. Branscomb cited the substantial majority of negative interpretations by qualified physicians as support for his negative diagnosis. Dr. Branscomb

noted that Claimant's pulmonary function was "ample for hard manual labor" as there were a number of fully normal tests and no valid objective indication of any pulmonary impairment. *Id.* The doctor also cited a negative biopsy as buttressing his conclusion that Claimant did not suffer from pneumoconiosis.

Dr. Sundaram was deposed on September 17, 2001. (EX 3). His testimony reiterated his previous reports. When questioned about the validity of Claimant's pulmonary function tests, Dr. Sundaram advanced that the patient's effort was reasonable as demonstrated by the graphs.

Dr. Gregory J. Fino performed an independent medical review on December 4, 2001. (EX 5). In his review, the doctor reviewed numerous reports from other physicians, chest x-rays, pulmonary function tests, arterial blood gas studies, and biopsy reports. Dr. Fino opined that Claimant did not suffer from pneumoconiosis based on the following: 1) the majority of chest x-ray interpretations are negative for pneumoconiosis; 2) acceptable spirometric evaluations are normal with no obstruction, restriction, or ventilatory impairment; 3) diffusing capacity values are normal; 4) no impairment in oxygen transfer; and 5) normal lung volumes. Dr. Fino also opined that Claimant's pulmonary system was normal and without impairment. The doctor stated that, assuming Claimant works at heavy labor, he retains the capacity from a respiratory standpoint to perform all the requirements of his last job. The doctor's opinion regarding Claimant's impairment level was based upon the claimant's pulmonary function test and arterial blood gas study results.

E. Pathology Report Evidence

Dr. Sam Davis issued a pathology report on February 14, 2001. (DX 35). The doctor reported that the specimen contained portions of benign lung parenchyma with mild nonspecific chronic inflammation. The test was negative for malignancy but was positive for small amounts of anthracotic pigment in the specimen.

On February 27, 2002, Dr. P. Raphael Caffrey issued a pathology consultation report. (EX 6). The doctor reviewed the February 14, 2001 pathology report in addition to other medical and employment records. The doctor reviewed the biopsy slides and diagnosed 1) benign lung parenchymal tissue and 2) a slight amount of black pigment or "soot." Reviewing the other medical

and employment evidence, Dr. Caffrey utilized a fourteen year coal mine employment history and
a thirty-one year smoking history for the claimant in his analysis of the objective medical evidence. After his review, Dr. Caffrey opined that Claimant did not suffer from pneumoconiosis or a disabling pulmonary impairment. The doctor stated, "The extreme paucity of the pigment noted on the biopsy material is certainly consistent with the fact that

all the chest x-ray interpretations that I have are negative for [pneumoconiosis]." *Id.* Dr. Caffrey attributed any impairment suffered by the claimant as a result of his cigarette smoking.

DISCUSSION AND APPLICABLE LAW

Because Mr. Litton filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). Furthermore, because the instant claim was brought more than one year after a previous denial,
the claimant must establish a material change in condition before his claim can be considered on the merits. To establish a material change in condition, claimant must establish one of the following elements with newly-submitted evidence: (1) the existence of pneumoconiosis; (2) total disability; or (3) total disability due to pneumoconiosis. Claimant cannot demonstrate a material change in condition by establishing the etiology of his pneumoconiosis as that element of entitlement was adjudicated in his favor by the previous administrative law judge. (DX 42-97). *See Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000)(holding that a claimant must establish, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him); *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000)(en banc on recon.).

In addition, the Sixth Circuit Court of Appeals, under whose jurisdiction this case arises, has included an additional element for duplicate claims. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994). In *Sharondale*, the court determined that the administrative law judge must examine the evidence underlying the prior denial to determine whether it "differ[s] qualitatively" from that which is newly submitted. In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit, citing *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), held that it is insufficient for the ALJ to merely analyze the newly submitted evidence to determine whether an element previously adjudicated against the claimant has been established. Rather, the court stated that the ALJ must also compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence "is substantially more supportive of claimant."

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

> (a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark*, 12 BLR 1-149 (1989).

The record contains fourteen interpretations of four chest x-rays. Of these interpretations, nine were negative for pneumoconiosis while five were positive.

Analyzing each x-ray individually, the June 12, 2000 x-ray is the only x-ray with a preponderance of the evidence positive for pneumoconiosis. The remaining three x-rays produced interpretations decidedly or uniformly negative, such as the June 2000 x-rays, or interpretations split down the middle, such as the April 22, 2002 x-ray. When I grant additional probative value
to the x-ray interpretations based upon physician credentials, however, the April 22, 2002 x-ray produced interpretations with a preponderance of the evidence negative for pneumoconiosis. As a whole, because the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence.

The newly-submitted evidence contains a biopsy report and a pathology consultation report. According to both reports, the biopsy failed to produce evidence positive for pneumoconiosis. Although both reports cited the presence of anthracotic pigment, the regulations clearly provide that a biopsy location of anthracotic pigment is not sufficient evidence, alone, to demonstrate the presence of pneumoconiosis. 20 C.F.R. §718.202(a)(2). I find the biopsy and pathology consultation report do not support a positive finding of pneumoconiosis by a preponderance of the evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising sound medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*,

10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

Dr. Sundaram produced two opinions contained in the newly-submitted evidence. Both opinions diagnose pneumoconiosis, but I grant the opinions no weight as the opinions are based on impermissible grounds for a "sound medical judgment" under section 718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000)(holding that, if a physician bases his or her finding of coal workers' pneumoconiosis only upon the miner's history of coal dust exposure and
a positive chest x-ray, then the opinion should not count as a reasoned medical judgment under § 718.202(a)(4)). The doctor's June 2000 opinion reveals that the doctor's rationale behind his positive diagnosis rested upon Claimant's coal dust exposure history and chest x-ray. Similarly, the doctor's July 2000 diagnosis of pneumoconiosis was based solely upon Claimant's history of coal dust exposure.

Dr. Dahhan opined that Claimant did not suffer from pneumoconiosis, and I find his opinion well reasoned and well documented. The doctor performed a standard pulmonary work-up, reporting clear results, and reaching explicit conclusions with identifiable rationales. Accordingly, I grant the opinion probative weight.

I similarly credit the independent medical review opinion of Dr. Branscomb. The doctor's opinion, which reported the doctor's conclusion that Claimant does not suffer from pneumoconiosis, is well reasoned and well documented. The doctor details the array of medical evidence he reviewed and provides coherent analysis of the entirety of the medical evidence. Thus, I grant the doctor's opinion probative weight on the issue of the presence or absence of pneumoconiosis.

Dr. Fino's independent medical review opinion is well reasoned and well documented. The doctor identifies the large amount of medical evidence he reviewed, and he reaches

reasonable medical conclusions from such evidence. Dr. Fino's reasoning is understandable, and I accord his opinion probative weight.

I do, however, accord the opinions of Drs. Branscomb and Fino less weight as their medical evidence reviews include analyses of medical evidence developed and placed in the record prior to the previous denial. As the bases for their opinions are evidentiary items beyond the immediate scope of inquiry for duplicate claim analysis, I find the doctors' opinions less probative, to a degree, and accord them less weight.

The preponderance of narrative medical evidence weighs in favor of a negative finding of pneumoconiosis. Dr. Dahhan's opinions do not constitute "sound medical judgments" under section 718.202(a)(4), and the remaining opinions, of varying probative worth, do not diagnose pneumoconiosis. Accordingly, Claimant has not demonstrated, by a preponderance of the evidence, that he suffers from pneumoconiosis.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204 (b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies.[6]

All ventilatory studies of record, both pre-bronchodilator and post- bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician

[6]A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

In the pulmonary function studies of record, there is a discrepancy in the height attributed to the claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). I accept the stipulated height of 68.75 inches.

The lone qualifying pulmonary function test is Dr. Dahhan's pre-bronchodilator study on July 22, 2000. The FEV_1 and MVV values reported fall below the disability thresholds, thus invoking 20 C.F.R. §718.204(b)(2)(i)(B).

The record, however, contains validation studies invalidating each of the three newly-submitted pulmonary function tests.

The opinions of Drs. Burki and Branscomb invalidating the June 28, 2000 pulmonary function test provide sufficient explanation to constitute substantial evidence of the invalidity of the study. I accept such opinions, and I grant them probative weight. Accordingly, I grant little weight to the June 28, 2000 pulmonary function test.

Dr. Burki's August 18, 2000 invalidation study of Claimant's July 17, 2000 pulmonary function test fails to constitute substantial evidence of the test's invalidity as the doctor's report fails to provide a specific rationale for rejection. *See Gabino v. Director, OWCP*, 6 B.L.R. 1-134, 1-139 (1983)(holding that consulting physician who merely places checkmark in box indicating "poor or unacceptable technique," without explanation, has not provided sufficient evidence to support his or her rejection of study). The doctor's invalidation fails to demonstrate how he concluded that
the patient had exhibited poor effort or cooperation. Accordingly, I grant little weight to Dr. Burki's August 18, 2000 invalidation, and I, concomitantly, grant probative value to the July 17, 2000 test.

The opinion of Dr. Burki invalidating the July 22, 2000 pulmonary function test provides sufficient explanation to constitute substantial evidence of the invalidity of the study. Thus, I grant the invalidation opinion probative weight, and I grant little weight to the July 22, 2000 pulmonary function test.

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal Co. v. U.S. DOL*, 854 F.2d 1212 (10th Cir. 1988), the court held that the administrative law judge must consider a physician's report which addresses the reliability and probative value of testing wherein he or she attributes qualifying results to non- respiratory factors such as age, altitude, or obesity.

The newly-submitted arterial blood gas studies appear to conform to quality standards, and, accordingly, I grant each probative weight. Neither of the newly-submitted studies produced qualifying values.

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings,

observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

In assessing total disability under § 718.204(c)(4), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, Case No. 99-3469 (6th Cir. 2000) (a finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations); *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). *See also Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(en banc on recon.). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

Dr. Sundaram's June 2000 opinion concluding that Claimant is totally disabled is poorly reasoned, and I grant it less probative value because of such malady. The doctor fails to explain the bases for his determination of total disability beyond "shortness of breath." Furthermore, Dr. Sundaram fails to demonstrate an explicit understanding of the exertional requirements of Claimant's coal mine employment, making his assessment based upon "shortness of breath" less probative.

Dr. Sundaram's July 2000 opinion is well documented and better reasoned than his previous report. The report, however, fails to explicitly demonstrate the tension between Claimant's exertional requirements in coal mine employment and his current physical condition. The doctor does, however, provide the bases for his determination that the claimant suffers from a severe impairment. Accordingly, I accord the doctor's opinion moderate probative weight.

Dr. Dahhan's opinion is well documented. The doctor opined that Claimant suffered from a mild obstructive ventilatory defect but was still capable of performing his usual coal mine employment. I do accord the opinion less weight, however, as I find the opinion inadequately reasoned. The doctor's opinion fails to address the exertional requirements of Claimant's coal mine employment beyond mentioning that he worked as a heavy equipment operator. The doctor's failure to explore the exertional requirements of Claimant's work renders his opinion that the claimant's "mild" obstructive defect would not prevent him from engaging in his usual coal mine employment less probative.

I find Dr. Branscomb's opinion well reasoned and well documented, and I accord it probative weight. The doctor's opinion is thorough and clear. It provides a sufficient

exploration of the exertional requirements of Claimant's employment and his current physical condition.

Dr. Fino's independent medical review is also well reasoned and well documented. While the doctor does not make specific findings on Claimant's job's exertional requirements, his opinion is based on an assumption that Claimant engages in heavy manual labor. Thus, I find his opinion on Claimant's impairment level probative.

Like my pneumoconiosis analysis, I do accord the opinions of Drs. Branscomb and Fino less weight as their medical evidence reviews include analysis of medical evidence developed and placed in the record prior to the previous denial. As the bases for their opinions are evidentiary items beyond the immediate scope of inquiry for duplicate claim analysis, the doctors' opinions are less probative, to a degree, and I accord them less weight.

When I consider all of the evidence addressing the claimant's impairment level, the preponderance of the evidence weighs against a finding of total disability. Weighing in favor of finding Claimant totally disabled stands only one pulmonary function test and Dr. Sundaram's opinions, which I found of limited value. In contrast, the probative value of the non-qualifying pulmonary function tests and arterial blood gas studies, combined with the opinions of Drs. Dahhan, Branscomb, and Fino, are persuasive. The evidence against a finding of total disability simply outweighs the evidence for a finding of total disability.

Further review of the newly-submitted evidence reveals that Claimant fails on another ground. The Sixth Circuit Court of Appeals requires the administrative law judge to compare the newly-submitted evidence with the previously submitted evidence to determine if it "differs qualitatively." *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001). The inquiry is whether the new evidence "is substantially more supportive of claimant." A review of the previous evidence and denial reveals this not to be true. The previous evidence contained primarily positive and some negative x-ray interpretations, physician opinions split on the issues of

pneumoconiosis and total disability, and pulmonary testing revealing a mild airway obstruction. The new evidence contains much the same. While the lone valid pulmonary function test in the newly-submitted evidence yields values lower than previously recorded for the claimant, the evidence as a whole is not "substantially more supportive of claimant."

Conclusion

In sum, the evidence does not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. As Claimant failed to prove any element previously adjudicated against him, he concomitantly failed to demonstrate a material change in

conditions. In addition, the newly-submitted evidence is not substantially more supportive of the claimant. Accordingly, the claim of Donald Litton must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Donald Litton for benefits under the Act is denied.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. §725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.